LIBRARY
SUPREME COURT, U. S.

FILE
JUN 18 19
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1559

THE HERTZ CORPORATION,
Petitioner,

vs.

DONALD COX and SARAH CROWE HARRIS,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

JAMES I. PARKER
DONALD B. HOWE, JR.
WADE C. HOYT, JR.
Attorneys for Respondents

Of Counsel:

PARKER AND O'CALLAGHAN
208 Main Street
Cedartown, Georgia 30125

HOWE, HOWE & SUTTON
18 Alabama Street
Tallapoosa, Georgia 30176

ROGERS, MAGRUDER AND HOYT
P. O. Box 268
Rome, Georgia 30161

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Question Presented 1

Reasons for Not Granting the Writ 2

Ground One—Stearns Case Did Not Define "Proper Insurance" 3

Ground Two—Cases Differ on Law and Facts 4

Ground Three—Erie v. Tompkins Settled Differences 8

Ground Four—Law of the Case 10

Ground Five—The Question Is Moot 11

Appendix—

Opinion, United States Court of Appeals for the Fifth Circuit (June 19, 1967) A1

Page One, Rental Agreement A17

Index of Authorities

CASES

A. & W. P. R. Co. v. *Wyly*, 65 Ga. 121 9

Buster v. *Wright*, 135 F. 947, App. Dis. 203 U. S. 599, 27 S Ct 777, 51 L. ed. 334 (1905) 11

Citizens & Southern National Bank v. *Huguley*, 100 Ga. App. 75, 110 S E 2d 63 9

Crowe, et al. v. *Hertz Corporation*, 382 F 2d 681 (1967) 4, 5, 6

Davis v. *O'Hara*, 266 U. S. 314, 69 L. ed. 303 (1924), 45 S Ct 104 11

Davis, et al. v. *Fidelity Fire Ins. Co. of Baltimore, et al.*, 208 Ill. 275, 70 N E 359 4

Diza A. v. *Patterson,* 263 U. S. 399, 68 L. ed. 356 (1923), 44 S Ct 151 11
Erie Railroad Company v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188, 58 S Ct 817 ..... 2, 8
Galpin v. *Page,* 85 U. S. 350, 21 L. ed. 959 11
Ga. Power Co. v. *Whitlock,* 48 Ga. App. 814, 174 S E 162 9
Insurance Company of North America v. *Atlantic National Insurance Company,* 328 F 2d 769, 771 10
Messenger v. *Anderson,* 225 U. S. 436, 56 L. ed. 1152 (1912), 32 S Ct 739 10
N. L. R. B. v. *Pittsburgh SS Co.,* 340 U. S. 498, 95 L. ed. 479, 71 S Ct 453 12
Rice v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U. S. 70, 99 L. ed. 897, 75 S Ct 614 12
Sowell v. *Sowell,* 212 Ga. 351, 92 S E 2d 524 9
Stearns v. *Hertz Corporation,* 211 F. Supp. 506 (E. D. Mo. 1962) 3
Stearns v. *Hertz Corporation,* 326 F 2d 405 (8th Cir. 1964) 2

TABLE OF STATUTES AND OTHER AUTHORITIES

37 Am Jur 2d, Fraud and Deceit, §342 Generally, p. 458 4
41 ALR 1057, 1078 11
Ga. Code Ann. §105-302 4

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1559

THE HERTZ CORPORATION,
Petitioner,

vs.

DONALD COX and SARAH CROWE HARRIS,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

Petitioner omitted the first and extremely important opinion of the United States Court of Appeals for the Fifth Circuit in this case. It is *Crowe, et al.* v. *Hertz Corporation*, 382 F 2d 681 (1967) and is included in respondents' Appendix.

QUESTION PRESENTED

In presenting its question to the Court, the petitioner has assumed legal conclusions which respondents respectfully submit are not correct. Respondents do not agree

that the Eighth Circuit, in deciding that there was no cause of action *ex contractu* in *Stearns* v. *Hertz Corporation*, 326 F 2d 405, has defined the term "proper insurance" to mean only that insurance required by the laws and customs of the place where a vehicle is rented and driven and that it is in conflict with the decisions of the Fifth Circuit Court in the instant case which is a cause of action *ex delicto* based on fraud and deceit.

REASONS FOR NOT GRANTING THE WRIT

The petitioner contends that the case of *Stearns* v. *Hertz Corporation*, 326 F 2d 405 (8th Cir. 1964) is in irreconcilable conflict with the decisions in this case. Respondents disagree and oppose the Petition on five grounds.

We respectfully submit that, first, the Stearns case does not hold that "proper insurance" means only the minimum insurance required under Illinois law; second, the case of *Stearns* v. *Hertz Corporation*, 326 F 2d 405 (8th Cir. 1964) differs from this case on its facts; third, it is immaterial, under *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S Ct 817, that laws of two states interpreted in Federal Circuit Courts differ. If, in fact, the 8th Circuit held in Stearns that Illinois law is that the minimum required by law is "proper insurance" that is certainly not the law of Georgia; and fourth, the law of the case was established so far as "proper insurance" is concerned by an earlier decision of the Circuit Court and could and should have been appealed then. Fifth, the point is moot because Hertz stopped advertising proper insurance in the late fifties.

GROUND ONE

Stearns Case Did Not Define "Proper Insurance"

In the Stearns case, the plaintiffs proceeded against Hertz on three theories: (1) that the passenger exclusion clause in the Continental policy provided by Hertz violated an Illinois statute; (2) that the renter, Sutton, had relied upon Hertz's advertisement of "proper insurance" as meaning passenger coverage, creating an implied contract, and (3) that the passenger exclusion clause was violative of the public policy of Illinois. The trial court, hearing the case without a jury, found that there was no contract to furnish passenger coverage and that the exclusion in the rental contract and in the policy was not violative of public policy.

The Stearns case proceeded on a theory of contract and warranty that Hertz had failed to provide what it had advertised and promised. The finder of fact (the Court without a jury) found against the plaintiffs. The language found in the trial court's decision of the Stearns case, *Stearns* v. *Hertz Corporation*, 211 F. Supp. 506 (E. D. Mo. 1962), reproduced on page A-32 of The Petition clearly shows that the trial court considered the case to be in contract. The Court's language is as follows:

> "Plaintiffs further contend that Benson's statement that Hertz furnished $25,000/$50,000 liability coverage and $5,000 property damage created an obligation to furnish coverage in this amount for injuries to any person. However, this oral statement, even if it could be construed as suggested by plaintiffs, could not be used to vary the terms of the written rental agreement, which unequivocally excludes coverage for passengers".

Judge Harper, in the next paragraph, cited an Illinois case, *Davis, et al.* v. *Fidelity Fire Ins. Co. of Baltimore, et al.*, 208 Ill. 275, 70 N E 359, which sets forth the rule that a written contract cannot be enlarged by parol evidence. Then the Court went on and made the point that distinguishes the Stearns case from this case as follows:

> "There are some exceptions to the above rule, the general exception being one of fraud, but there is nothing in the testimony in this case in any way that would make the contract an exception to this general rule." (A-33)

The holding in Stearns is simply that the plaintiffs therein could not recover *ex contractu*. It did not hold that "proper insurance" is the minimum required by law.

GROUND TWO

Cases Differ on Law and Facts

The present case against Hertz is one in tort for fraud and deceit. This is a statutory remedy in Georgia. Ga. Code Ann. §105-302.

The measure of damages for fraud and deceit is the actual damage sustained, 37 Am Jur 2d, Fraud and Deceit, §342 Generally, p. 458.

The Fifth Circuit Court distinguished the cases in the following language:

> "Hertz contends that Stearns is on all fours with this case and is not distinguishable. We disagree. In Stearns the misrepresentation occurred in Illinois, the rental agreement was signed in Illinois and the accident occurred in Illinois. It was conceded that the law of Illinois would control. *Id.* at 406. In

this case, while the rental agreement was signed in the Bahamas and the accident occurred in the Bahamas, the misrepresentations and the wrongs occurred in Georgia and Kentucky, respectively." *Crowe, et al.* v. *Hertz Corporation*, 382 F 2d 681. (R App. 7, 8).

There are other points of distinction between the two cases.

The Stearns case was in contract. The Stearns case sought to impose a contractual duty on Hertz by virtue of an Illinois statute; by an implied contract; and through public policy. Because the Eighth Circuit rejected these contentions, Hertz now says that the parties in this case are restricted to an insurance policy written under Bahama law which permits the issuance of liability policies on self-drive automobiles which excludes passengers.

A concise statement of the facts in this case was set out by Judge Tuttle in the first report, *Crowe* v. *Hertz Corporation*, 382 F 2d 681 (R App. 2).

As stated by Judge Tuttle, the substance of the complaint was that the defendant, The Hertz Corporation, held itself out, both by long, continuous and saturation type advertising to offer Rent-A-Car services throughout the world; that this service included complying with the highest standards of insurance coverage; . . . that Miss Crowe was entitled to the protection of a public liability insurance policy, both contracted for from the local agency and as held out under the policy actually issued for the protection of the drivers against liability claims of passengers and thus excluded any benefit to an injured passenger like Miss Crowe; that this exclusion was false and contrary to the representations contained in national advertisements of the Hertz Corporation and amounted to a fraud upon the renters of automobiles such as Cox, for

which recovery could be had for the benefit of the passenger. *Crowe* v. *Hertz Corporation*, 382 F 2d 681 (1967).

Petitioner conveniently overlooks the evidence that it told its stockholders, in 1964, that its advertising program assured the public that it had insurance of the "highest standards" and gave Hertz's assurance to each customer that he will be satisfied with "all phases of his car rental anywhere in the world." See *Crowe* v. *Hertz Corporation*, 382 F 2d 681 at p. 684. By its own admission, petitioner shows by 1964 it meant to go even farther than just "proper insurance."

The statement from the 1964 annual report of the Hertz Corporation quoted in Judge Tuttle's opinion, makes a much stronger case against Hertz than the evidence in the Stearns case, which is as follows:

> "'Certified Service' was vigorously merchandised during the year to emphasize the quality of Hertz Rent-A-Car. This program—an industry exclusive, backed up a pledge of $50 in car rental credits—sets the highest standards for equipment used, maintenance, appearance, cleanliness, insurance coverage and reservation reliability. It is Hertz's assurance to each customer that he will be satisfied with all phases of his car rental anywhere in the world". *Crowe* v. *Hertz Corporation*, 382 F 2d 681 at p. 684. (R App. 7).

The basic issue for determination in this case as set out by the Circuit Court's first opinion was whether or not a corporation could advertise itself as a worldwide corporation affording insurance of the highest standards to Americans wherever they might travel in the world, and avoid responsibility for its representations made through the various news media of the country by answering that it furnished the minimum required by law.

The rental agreement on the automobile involved in the collision was attached to the plaintiff's original complaint and was introduced into evidence. Page one of the agreement is attached hereto as a part of the appendix.

There is a considerable amount of printed matter on page one, of which the following is a part, to-wit:

> "7. The vehicle is covered by an automobile liability insurance policy, a copy of which is available for inspection at the main offices of Lessor upon request by customer. Said policy contains bodily injury or death liability, limits of $100,000.00 for each person in each accident, $300,000.00 for all persons in each accident, and property damage liabilities of $25,000.00 for each accident."

This statement, like the Hertz advertising, was false—no such policy of insurance existed. A policy without limits covered the automobile, but passengers were excluded. This rental contract stated that all persons were insured; while the contract in the Stearns case expressly excluded passengers.

In early discovery, the following interrogatories were submitted to defendant, The Hertz Corporation, regarding insurance, to-wit:

> "9. Was there a policy of liability insurance with limits of $100,000.00 for each person and each accident, $300,000.00 limits for all persons in each accident, property liability limits of $25,000.00 for each accident, in force covering the Vauxhall Victor 4 door sedan automobile in which plaintiff was injured on June 8, 1965?"

To this interrogatory, the defendant, by its vice-president, Mr. Reiter, answered:

"This defendant has no knowledge or information concerning the liability insurance, if any, on the automobile."

Another question followed:

"10. Give the names of any and all insurance companies having liability insurance coverage on said vehicle on June 8, 1965."

To the question, the defendant answered simply, "See answer to 9." (C. A. No. 2, p. 371).

These answers, we say, show a complete and utter disregard of the responsibility Hertz had assumed by its advertising. As can be seen by the advertisement described in the decisions in this case, along with the admission of Hertz's annual report, it had advertised worldwide that Hertz's automobiles were covered not just by insurance, but by "proper insurance", "public liability insurance", and insurance of the "highest standards." Yet, in these answers to interrogatories, it admitted that it did not even know whether there was insurance on this automobile. This statement alone, we submit, made a case of fraud and deceit.

GROUND THREE

Erie v. Tompkins Settled Differences

Under the rule laid down in the often cited case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S Ct 817, we are only here concerned with Georgia law.

The Court of Appeals of the State of Georgia has frequently interpreted the word "proper" as modifying the word "lookout." In such instances, the Court has held that "proper lookout" is a matter to be interpreted under all the circumstances by a jury. In the operation of an automobile or airplane such questions are for the jury.

In *Citizens & Southern National Bank* v. *Huguley*, 100 Ga. App. 75, 77, 110 S E 2d 63, the Court stated "we have already seen that it *may* be gross negligence to fail to keep a proper lookout ahead." (Italics added).

Both the Court of Appeals of Georgia and the Supreme Court of Georgia have defined "proper care and diligence." "Proper care, reasonable care, and ordinary care and diligence are synonymous, and proper care is the equivalent of ordinary care." *A. & W. P. R. Co.* v. *Wyly*, 65 Ga. 121; *Ga. Power Co.* v. *Whitlock*, 48 Ga. App. 814, 174 S E 162.

The Supreme Court of the State of Georgia, in the case of *Sowell* v. *Sowell*, 212 Ga. 351, 92 S E 2d 524, discussed at length the distinction between a "proper party" and a "necessary or indispensable party".

The case was decided in 1956 when demurrers were still a part of our civil procedure in Georgia. The joinder or nonjoinder of proper parties were the subject of special demurrers while the failure to name a necessary or indispensable party left the petitioner without a cause of action and the court without jurisdiction and therefore, was the subject of a general demurrer. As to proper parties to a suit, the matter was left to discretion or choice.

The point of this analogy is that the word proper has been recognized by the courts of Georgia to mean something less than an absolute standard either maximum or minimum.

An examination of the definition of the word proper, in Webster's New International Dictionary, Third Edition, reveals that it has many meanings such as appropriate, fit, suitable, and right, but it certainly does not create an absolute standard.

By advertising proper insurance, Hertz did not set for itself an absolute minimum, but that which was reasonable and prudent.

As pointed out in the first decision of the Fifth Circuit Court, the evidence in this case was that it is common, customary and actually universal usage in Georgia that liability insurance policies cover guests and passengers in automobiles driven by one having expressed or implied permission of the owner or insurer (R App. 7, 9, 10).

It is interesting to see that the Fourth Circuit Court of Appeals has considered a policy almost identical to the policy in this case and found it to be substandard. It held in *Insurance Company of North America* v. *Atlantic National Insurance Company*, 328 F 2d 769, 771, that an automobile liability policy on a Hertz vehicle excluding coverage as to passengers or as to operation of an automobile in violation of a rental agreement was neither a "standard provision automobile liability policy", nor "substantially the equivalent", thereof under Virginia law.

GROUND FOUR

Law of the Case

This case has been in litigation since the summer of 1965. Although the Circuit Court of Appeals has decided this case twice before, Hertz did not appeal to this Court, but was content to allow the case to be remanded and retried. As defined by Mr. Justice O. W. Holmes, the law of the case expresses the practice of the Courts generally to refuse to reopen what has been decided. *Messenger* v. *Anderson*, 225 U. S. 436, 56 L. ed. 1152 (1912), 32 S Ct 739. Respondents recognize that this Court has ruled that it will not be bound, as a matter of law, by decisions of Courts of Appeals unappealed from in previous appeals.

Buster v. *Wright*, 135 F. 947, App. Dis. 203 U. S. 599, 27 S Ct 777, 51 L. ed. 334 (1905); *Diza A.* v. *Patterson*, 263 U. S. 399, 68 L. ed. 356 (1923), 44 S Ct 151; *Davis* v. *O'Hara*, 266 U. S. 314, 69 L. ed. 303 (1924), 45 S Ct 104; *Galpin* v. *Page*, 85 U. S. 350, 21 L. ed. 959. See the annotation at 41 ALR 1057, 1078. However, no reason appears or can appear why Hertz could not have sought a ruling by this Court on this exact point when it had the opportunity to do so on the previous appeals to the Fifth Circuit Court of Appeals. Petitioner has insisted at every stage of this case that it is controlled by Stearns. The case was cited no less than seven times in its first brief in the Circuit Court.

Its election to abide the previous decisions without appeal has caused respondents great expense and considerable delay in trying a long and difficult case. This type of deliberate delay is unnecessary, unfair and conducive to criticism of our judicial system.

GROUND FIVE

The Question Is Moot

The sole question presented by the petitioner is what meaning the term "proper insurance" should have. A conflict between decisions of the Fifth Circuit and the Eighth Circuit is alleged. No other reason is given to the Supreme Court in seeking review on Writ of Certiorari.

We respectfully submit that the question is now moot. "Proper insurance" has not been used in Hertz Advertisement since the late fifties. The general counsel for the Hertz Corporation testified at the last trial that the phrase "was insignificant in terms of sales or any other—for any other purposes." (C. A. No. 2, App. 530, 531, 537). The "impossible burden and uncertainty" created by the "rea-

sonable renter passenger definition" applied to "proper insurance" by the Fifth Circuit described in the Petition seems to us to be somewhat akin to the hysteria of Chicken Little.

CONCLUSION

The differences in results in the Stearns case and this case arise entirely upon differences of the facts as framed in the pleadings. The rental contract in Stearns described an insurance policy which excluded passengers. The contract in the instant case described a policy that covered passengers. The Stearns case sought relief *ex contractu* seeking to modify a contract which could not be done. The present case is an action *ex delicto* for fraud and deceit. These differences certainly present no "real and embarrassing conflict of authority by the Courts of Appeals" requiring review by this Court. *N. L. R. B.* v. *Pittsburgh SS Co.*, 340 U. S. 498, 95 L. ed. 479, 71 S Ct 453; *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 99 L. ed. 897, 75 S Ct 614.

Respectfully submitted,

JAMES I. PARKER
DONALD B. HOWE, JR.
WADE C. HOYT, JR.
Attorneys for Respondents

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23775

SARA C. CROWE, by and through L. L. CROWE, as next friend, and DONALD COX,
Appellants,

versus

THE HERTZ CORPORATION,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(June 19, 1967.)

Before TUTTLE, Chief Judge, AINSWORTH, Circuit Judge and FULTON, District Judge.

TUTTLE, Chief Judge: This is an appeal from a summary judgment dismissing a personal liability damage suit arising out of an injury suffered by the appellant in the Bahama Islands while she was riding in an automobile driven by the defendant, Donald Cox, rented by the latter from the local Hertz Rent-A-Car station. The appeal is joined by Cox, an original defendant, whose cross-complaint against Hertz was also dismissed by the order of the trial court.

The substance of the complaint was that the defendant, The Hertz Corporation, held itself out, both by long, continuous and saturation-type advertising to offer rent-a-car service throughout the world; that this service in-

cluded furnishing of the highest standard of insurance coverage; that Cox, together with two friends, rented a "Hertz" car for their use from a rent-a-car station bearing the "Hertz" sign and symbol under circumstances that made Cox an insured driver; that in driving the appellant, Miss Crowe, on the roads in the Bahamas, Cox was involved in a head-on collision with another car owing to his lack of knowledge of the local driving requirements that automobiles be driven on the left rather than the right side of the road; that Cox's negligent driving seriously injured the plaintiff;[1] that Miss Crowe was entitled to the protection of a public liability insurance policy, both contracted for from the local agency and as held out under the worldwide advertising by the defendant, Hertz Corporation; that the policy actually issued for the protection of the drivers of the rent-a-car system in the Bahamas excluded protection of the drivers against liability claims of passengers and thus excluded any benefit to an injured passenger like Miss Crowe; that this exclusion was false and contrary to the representations contained in national advertising of the Hertz Corporation and amounted to a fraud upon the renters of automobiles such as Cox, for which recovery could be had for the benefit of the passenger.

In his defense, Cox admitted the accident, but denied liability, contending that the accident was not due to his negligence. Cox also filed a third party claim over against the Hertz Corporation, reasserting the grounds of action as alleged by Miss Crowe and also relying upon the holding out by the national advertising of Hertz Corporation to him as a renter of a Hertz car.

---

1. The allegations of the complaint showed that Miss Crowe had suffered brain damage and was unable to conduct the case on her own account, thus accounting for the suit being brought by her father as next friend.

In view of our conclusion that the trial court erred in summarily dismissing not only Miss Crowe's, but also Cox's claim against the Hertz Corporation, without determining whether there existed facts upon which relief could be granted in the event that Hertz was found to be a proper party defendant, we find it necessary to make a fairly full statement of the facts.

The following is a statement which the trial court found to be uncontradicted facts. The statement is taken from the opinion of the trial court.

On June 7, 1965, the defendant, Donald Cox, with Bill Grubbs and Aldo Bergomi went to a desk bearing a large sign, "Hertz Rent A Car" at the Sheraton British Colonial Hotel in Nassau, Bahama Islands, where an automobile was rented. It was a 1964 or 1965 model Chevelle red convertible.

The three of them talked with each other in the presence of the man at the desk about sharing the use, and cost, of the car rental and discussed with the man the rental cost, with and without insurance, and decided to contract to pay the "with insurance" rate. The man at the desk, so Cox believes, wore a shirt or uniform with a parallelogram "Hertz" on it. Donald Cox believed that the three of them rented the automobile jointly, but only Bergomi signed the rental agreement.

Cox drove the rented car away from the rental agency on the afternoon of June 7, 1965, and the three of them took turns driving about the island. That night Cox and Grubbs used the car. Bergomi was not along. Cox and Grubbs returned the keys to the "Hertz" desk at the hotel that night. Bergomi, Cox and Grubbs divided the costs of renting the car.

Late the next day, on June 8, 1965, Bergomi told Grubbs and Cox that he wanted to again rent a car and asked them if they wished to "go in on it", and they agreed to share the use and expense of the car. Bergomi went alone and rented a Vauxhall 4-door sedan and the three boys drove the three Crowe girls about the island.

On the evening of June 8, 1965, Cox and the plaintiff, Sara Crowe went out in the car together and at about 11:30 P.M. were involved in a headon collision with another automobile and the plaintiff was injured.

After the accident the wrecked car was towed to a large fenced in lot bearing a large "Hertz" sign and there stored.

The Hertz signs were the same type as used by the Hertz Corporation in their advertising in the United States.

After the occurrence here involved, Mr. James I. Parker visited Nassau, and a "Hertz" Rent A Car station nearby and photographed the station, which bore "Hertz Rent A Car" signs.

On March 23, 1966, counsel for plaintiff, Harold L. Murphy, along with associate counsel, James I. Parker, went to the office of Hertz Rent A Car in Nassau, Bahamas, to interview its manager, Terry Morrissey, and while waiting for him, Mr. Murphy picked up from the ground to the rear of the offices certain receipts and certain rental car invoices showing the front and back of rental contracts.

Mr. Murphy examined the agreements found there with rental agreements issued by offices of the Hertz Corporation in the United States, and the rental agreement issued upon the automobile in which plaintiff was riding at the time of her injury, and in each instance found page one to be identical, and page two to be identical except

for the filled in information as to type of car, charges, time, etc.

At the time of Murphy's visit to "Hertz Rent A Car" Nassau, Bahamas, he acquired a Hertz Rent A Car reservation entitled Hertz Reservation Office, 660 Madison Avenue, New York, N. Y., reserving an automobile for a customer arriving at Nassau, Bahamas, on March 10, 1966, which address is also that of the executive offices of the Hertz Corporation as shown in the 1964 annual report of the Hertz Corporation.

At the office of Hertz Rent A Car in Nassau, "Hertz Rent A Car" signs were prominent in several places as were the same type signs in two rental station places in down town Nassau. This is the same type sign that appears on rental agreements issued by the Hertz Corporation and its licensees in the United States.

Murphy obtained at the Hertz Rent A Car office in Nassau a Hertz circular advertising Hertz Rent A Car and Hertz Service in Nassau— "We'd like to show you Nassau. Let Hertz put you in the driver's seat," etc. "Just give us a call at 77366 or 23496 and watch Hertz in action."

Van G. Hunt, an expert on American automobile liability insurance, has read advertisements displaying the Hertz Rent A Car in a parallelogram familiar to him as the Hertz trademark, which advertisements contain the language, "Rental fees include—all gasoline, oil . . . public liability, property damage, fire and theft insurance, and $100 deductible collision protection", and which state Hertz low rates cover everything including $100 collision protection. Hunt also read in the 1964 Annual Report of the Hertz Corporation:

> " 'Certified Service' was vigorously merchandised during the year to emphasize the quality of Hertz Rent

A Car. This program—an industry exclusive, backed up a pledge of $50 a car rental credits—sets the highest standards for equipment used, maintenance, appearance, cleanliness, insurance coverage and reservation reliability. It is Hertz's assurance to each customer that he will be satisfied with all phases of his car rental anywhere in the world."

It is Mr. Hunt's opinion that "proper insurance" includes adequate public liability insurance to cover personal injury caused by the negligence of an insured driver to protect him from claims of persons who might be struck by the automobile or injured while riding therein as a passenger.

"According to custom, practice and usage in the insurance industry, bodily injury liability insurance is considered the most important coverage in the field of automobile insurance and would certainly be included in 'proper insurance'.

"According to common usage and custom in the insurance industry, bodily injury liability insurance covering passengers of an automobile would certainly be included in 'insurance coverage' of 'the highest standard' as referred to as a part of 'certified service' in the Hertz Corporation 1964 annual report."

On August 15, 1965, Mr. James I. Parker went to Nassau, Bahamas, to investigate the automobile collision of June 8, 1965, and the claim of Sara C. Crowe and while there Mr. Terry Morrissey furnished to him a carbon copy of a rental agreement which is attached to the complaint, stating to Mr. Parker that this was the office copy of the rental agreement on the automobile in which plaintiff was injured.

At Morrissey's direction Mr. Parker went to the agency office of McCarthy Miller, Ltd., and was there told by the adjuster in charge that the automobile in which plaintiff was riding at the time of the collision was covered by a policy of insurance issued by Fireman's Insurance Company of Newark, New Jersey, but that there was no coverage afforded plaintiff because she was a passenger. Passengers, he stated, were excluded. The adjuster furnished to Mr. Parker a copy of the policy provisions which were made available to the Court.

The place where Mr. Morrissey was interviewed was outside the City of Nassau, near the airport, and bore several large Hertz signs similar in color and design to the usual Hertz signs.

A wrecked Vauxhall at the rear of the building was pointed out by Morrissey as the automobile in which plaintiff was injured.

Hertz, Hertz Rent A Car System, during the years 1956-64 advertised in Time Magazine. Many of these advertisements in the years 1956, 1957, 1958 and one or more in 1959 and 1960, and more than one in 1961 and 1962 stated that the low Hertz rates include everything, gas, oil, insurance or proper insurance. One advertisement on October 26, 1959, stated that Hertz has over 1750 offices spread throughout the United States and 31 foreign countries.

It further stated wherever you are, wherever you are going, there is a Hertz office nearby to serve you.

This advertisement further stated that Hertz rates include gas, oil and proper insurance.

Other ads stated "Hertz pays for insurance, gas and oil", or "Hertz pays for everything, insurance, gas and oil."

Mr. James Brown, an expert on automobile liability insurance is of the opinion that "proper insurance with reference to automobile coverages" would in all instances be "a liability insurance policy of standard terminology including liability claim protection as a result of personal injuries and property damages together with coverage for medical payments for passengers riding within the insured vehicle. This coverage is the customary coverage in the industry."

Mr. Brown is of the opinion that the insurance coverage afforded by the Firemens Insurance Company policy identified by Mr. Parker is not standard, is inadequate and does not afford even elementary requirements of a liability insurance policy.

The Hertz Corporation 1964 Annual Report, at page 12, states:

"INTERNATIONAL OPERATIONS.

> "Hertz Service outside the continental United States is provided by Hertz American Express International, Ltd., the subsidiary jointly owned by the corporation (51 per cent) and by the American Express Company, Inc. (49 per cent) . . . ."

The Hertz Corporation Annual Report 1965, under the heading "International Operations", at page 14, states:

> "The strong leadership position of Hertz in the international field was further enhanced by expansion on a worldwide front in 1965. Since its formation in 1957, Hertz American Express International, Ltd., (49 per cent owned by The American Express Company, Inc.) has become the largest vehicle renting and leasing organization operating outside the United States."

The plaintiff, Sara C. Crowe, underwent brain surgery at Emory University Hospital on Mrch 24, 1966, and is neither physically nor mentally able to give an affidavit for use herein at this time.

The plaintiff, prior to her injury, was a school teacher, a college graduate, well read and was a regular reader of Time Magazine and other national magazines and in the opinion of her father was familiar with the Hertz advertisements and the Hertz trademark.

In addition to the facts above stated by the trial court and adopted by us as correctly stating the posture of the matter at the time the trial court passed on the motion for summary judgment, the trial court also stated the following as being uncontroverted facts:

"It appears from the affidavit of Mr. Reiter, a vice president of the Hertz Corporation, that the Hertz Corporation was not doing business and did not do any business in the Bahama Islands during the year 1965, including June 8, 1965.

"That Caribbean Holding Company (Bahamas, Ltd.) was not on June 8, 1965, nor at any time since that date the agent or representative of the Hertz Corporation.

"That the Hertz Corporation did not furnish to the said Caribbean Holding Company any written rental agreement, and did not require that Caribbean Holding Company use the printed form as charged in the complaint.

"That Firemans Insurance Company of Newark, New Jersey, was not an insurance carrier for the Hertz Corporation with respect to any matter set forth in the complaint in this case."

Based entirely upon the affidavit of Mr. Reiter and upon the Hertz Corporation's annual statement that "Hertz

service outside the continental United States is provided by Hertz American Express International, Ltd." the trial court dismissed the complaint against Hertz. The court said:

"Plaintiff undertakes by circumstantial evidence to show that the Hertz Corporation was present and doing business in Nassau, Bahamas on June 8, 1965. However, the circumstances upon which Plaintiff relies are consistent with the testimony of Mr. Reiter and Hertz Corporation's statement in its annual report that 'Hertz service outside the continental United States is provided by Hertz American Express International, Ltd. . . .'

"A fact cannot be established for circumstances which are perfectly consistent with direct, uncontradicted, and unimpeached testimony that the fact does not exist." 32 A. C.J.S. Evidence, §1039, pp. 755, 756. See also *Wood v. Keen, et al*, 207 Ga. 317 (1).

"It is thus uncontroverted that the Hertz Corporation was not doing business in Nassau, Bahamas, on June 8, 1965, nor at any time that year. It is also uncontroverted that the company operating the Hertz Rent-A-Car place was not the agent or representative of the Hertz Corporation and that the Hertz Corporation had no knowledge of, and did not participate in the renting on June 8, 1965, of the car in which plaintiff was riding at the time of her injuries."

Thereupon the trial court dismissed the Hertz Corporation as a defendant, both as to the suit by Miss Crowe and as to the third party claim by defendant Cox.

In dismissing the complaint against the Hertz Corporation it is obvious that the trial court did so on the theory that the transaction between Cox and his friends in the Bahamas was not with the Hertz Corporation either di-

rectly or through an agent of that company. This, it seems to us, overlooks the essential nature of the suit that is brought by Miss Crowe and particularly as contended for by Cox, who admittedly is a protected driver of a "Hertz Rent-A-Car" so far as being entitled to insurance protection is concerned. The complaint is based on the assumption that every person reading and relying upon the Hertz advertising is warranted in accepting as true the statement that wherever a "Hertz" car is rented worldwide, the person relying upon such advertising is guaranteed that the highest standard of insurance protection is offered; that in this case the defendant Hertz Corporation, whether or not acting through its agent in the usual sense nevertheless provided through its subsidiary corporation for the renting to Cox of a "Hertz" car which did not have the insurance protection guaranteed to the public. The trial court stated, "The court recognizes the principle of law that where misrepresentations are made to the public at large with the intention of influencing any member of the public, then anyone injured through proper reliance thereon may secure redress," citing *Hinds v. Wilson*, 164 Ga. 889 (2) (b). The court then stated: "This principle of law which plaintiff seeks to invoke has no application under the facts here."

This conclusion was doubtless based upon the court's prior determination that the Hertz Corporation was not present either in person or through an agent in the Bahama Islands.

We think it plain that the presence or absence of the Hertz Corporation in the Bahama Islands at the time this automobile was rented by Cox and his friends, is irrelevant to the cause of action asserted by the injured plaintiff. Certainly it is irrelevant to the cross action filed on

behalf to Cox to secure his insurance protection in the event Miss Crowe should recover against him.

Moreover, we conclude that the trial court dealt too summarily with the question of the agency of the local "Rent-A-Car" station in the Bahamas for the Hertz Corporation. The quoted language in the trial court's opinion that a fact cannot be established by circumstances which are consistent with the direct, uncontradicted and unimpeached testimony that the fact does not exist, comes the Georgia case of *Wood v. Keen, et al,* 207 Ga. 317 (1), which cites the United States Supreme Court's opinion in *Pennsylvania R.R. v. Chamberlin,* 288 U.S. 333 (1932), a case which we have had occasion to discuss fully in an opinion just published in *Planters Manufacturing Co. v. Protection Mutual Insurance Company,* No. 23019, Dec. May . . ., 1967. As we stated in that opinion (see footnote 4) the language of the *Chamberlin* case may no longer be a correct statement of the federal jurisprudence in light of the more recent Supreme Court decision in *Lavender v. Kurn,* 327 U.S. 645, a point which we felt was not necessary for our decision in the *Planters Manufacturing Company* case. But see *Preston v. Safeway Stores,* 163 F. Supp. 749 (D.C.). Nor do we think it necessary to determine this question here. This is true because we think it quite clear that the existence *vel non* of "agency," or "representative," a status or relationship depending upon all the facts and circumstances, is not such physical or historical fact of the kind contemplated within the rule. If it were possible for a witness to directly, without contradiction, and without impeachment, testify flatly that he was not an agent or representative of another so that no circumstances, however strong, and no facts relating to conduct of the parties, or anything else could be permitted to overcome such conclusionary testimony, a large function of the fact finder's role in the de-

cisional process would be eliminated.[2] It would be tantamount to a rule that if Party A swears he was not *negligent,* then Party B could not prove A's negligence by circumstantial evidence.

> "It is a well settled principle of law that actual agency may be proved from the habits, course of dealing and apparent relations; that is to say, that when a course of dealing has been prolonged with the knowledge and consent of the principal, actual agency can be inferred from such course of dealing."
>
> *Piedmont Operating Co. v. Cummings,* 40 Ga. App. 397.

Whether an agency exists is not solely dependent upon the announced purpose of intention of the parties, for the law creates a relation of principal and agent if the parties, in their conduct of their affairs, actually place themselves in such position as requires the relationship to be inferred by the courts. Thus, even though a party may testify positively that there is no "agency," in existence between his company and another, this does not deprive the party relying on the existence of such agency to introduce evi-

---

2. Purely as an illustration of the reason why such rule cannot be recognized, we note the obvious equivocal nature of Reiter's bald statement: "Caribbean Motor Holding Co. (Bahamas) Ltd. [the owner of the Hertz Rent-a-car station in Nassau] was not, on June 8, 1965, or at any time since said date, an agent or *representative* of the Hertz Corporation," (emphasis added) when viewed in light of the fact stated in the annual report for 1964: "Hertz service [dealing, of course, with service of interest and financial benefit to Hertz Corporation stockholders] outside the continental United States is provided by Hertz American Express International, Ltd." Should the jury be precluded from ascertaining whether the Hertz American Express International licensee in Nassau was not some kind of a "representative" of the Hertz Corporation which advertised its service to the stockholders as a significant part of the corporation's operations? At the very least it "represented" that it was in a position to carry out part of the Hertz Service, which included the plea, *worldwide,* "Let Hertz put you in the driver's seat."

dence showing the actual conduct of the parties if such conduct is such as would permit an inference to be made that the relationship of agency truly exists. See *Griffin v. Russell*, 144 Ga. 275. See also 3 Am. Jur. (2d), Agency, §17,18.

What we have said here deals with actual agency, not the creation of an agency by estoppel for the protection of one who has relied upon the appearance of such relationship. However, in this case it is equally available to the cross-claimant Cox to undertake to show, if the facts warrant it, that an agency by estoppel existed as to him, since he actually dealt with the "Hertz Rent-a-car" station in the Bahamas. Such an apparent agency could not exist for the benefit of the person injured without reliance upon the apparent holding out of the principal. See *Piedmont Operating Co. v. Cummings, supra.*

Because of the determination by the trial court that the Hertz Corporation was not present in the Bahamas through its agent, the court did not consider whether the complaint alleged a state of facts upon which relief could be granted either to Miss Crowe or to the cross-complainant Cox. We, therefore, do not pass on these questions. We hold that the circumstances found by the court to exist were sufficient to require that the case not be disposed of on motion for summary judgment dealing with the existence *vel non* of an agency for the Hertz Corporation in the Bahama Islands. We also conclude that the actual presence of the Hertz Corporation by an authorized agent in Nassau is not requisite to the bringing of the complaint against the Hertz Corporation on the theory propounded by the plaintiff and adopted by the cross-complainant—that is to say, the theory that the Hertz Corporation acted contrary to its widely advertised statements relating to the making available of maximum insurance protection as to every Hertz car when, by

whatever arrangement, it permitted its subsidiary to in turn license a local operator who failed to do what the advertisements promised. Again we do not here consider whether the complaint, as finally amended, established a cause of action, because this issue has not been passed on by the trial court. The ground for dismissing the suit being in error, the case must be returned for further consideration of the trial court.

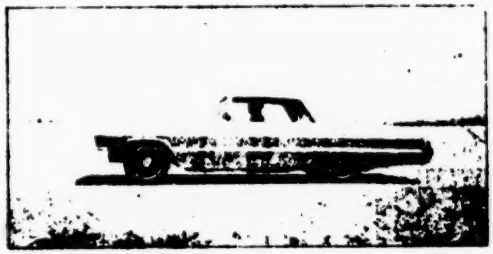
The judgment dismissing the complaint and cross-complaint against Hertz Corporation is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

POOR COPY

RENTAL AGREEMENT

HERTZ

let *HERTZ* put you in the driver's seat!



Page 1

Lessor identified on Page 2 hereby rents to the customer(s) undersigned on Page 2 herein called "Customer") the motor vehicle described on Page 2 herein called "Vehicle" subject to all the terms and provisions on Page 1 and Page 2 of this Rental Agreement, in consideration whereof Customer acknowledges and agrees:

1. Vehicle is the property of Lessor and is in good mechanical condition. Customer will return vehicle, together with all tires, tools, accessories and equipment in the same condition as when received, ordinary wear and tear excepted, to the place and on the date specified on Page 2 or sooner if demanded by Lessor.

2. Under no circumstances shall vehicle be used operated or driven: (A) for the transportation of persons or property for hire; (B) by any person who has given to Lessor a fictitious name or false age or address; (C) in any race, speed test or contest; (D) to propel or tow any trailer or (E) by any person except (1) Customer or (2) a qualified licensed driver and provided Customer's permission to drive is not delegated, or (3) Customer's family, (b) Customer's employer or (c) an employee of Customer in the course of such employee's regular employment by Customer. The foregoing restrictions are conditions, and each of them shall apply to every use, operation or direction of vehicle.

3. Customer will pay Lessor on demand all time and mileage service, minimum or other charges to be entered on Page 2 at the rates so shown or in use relative to any of the provisions of this Rental Agreement. Subject to paragraphs 5 and 8 hereof, Customer is responsible for and will indemnify Lessor on demand for (1) loss of or damage of whatsoever kind or nature to vehicle or the tires, tools, accessories and equipment therein or thereon, but not to exceed $100 unless vehicle was used, operated or driven in violation of any of the provisions of this Rental Agreement, (2) [illegible] transmitted to another person, firm or organization or body of which motor being an integral part, and (3) [illegible] said charges.

4. Customer or the driver of vehicle shall in no event be or be deemed the agent, servant or employee of Lessor [illegible] for any purpose whatsoever.

5. Lessor shall not be liable for loss of or damage to any property left, stored or transported in Customer's vehicle, other personal [illegible] return thereof to Lessor, whether or not said loss or damage was caused in whole or in part by the negligence of Lessor, its agents, servants or employees. Customer hereby assumes all risk of such loss or damage and waives all claims against Lessor by reason thereof, and Customer hereby agrees to hold harmless and indemnify Lessor against all claims based upon or arising out of such loss or damage.

6. Customer shall not be liable to Lessor on account of [illegible] collision losses to vehicle covered by a standard comprehensive insurance policy, including losses due to fire and theft.

7. Vehicle is covered by an automobile liability insurance policy, a copy of which is available for inspection at the main office of Lessor upon request by Customer. Said policy contains bodily injury or death liability limits of $100,000 for each person in each accident, $300,000 limit for all persons in any one accident, and property damage liability limits of $25,000 for each accident. Customer, being an insured under said policy, agrees to comply with and be bound by all the terms, conditions, limitations and restrictions thereof which are hereby incorporated by reference herein and made a part of this Rental Agreement as fully as if set forth at length. Said terms, conditions, limitations and restrictions of which no specific mention is made herein, include a requirement of said policy that the owner of the vehicle, if the vehicle must remain immediately after any accident report the same to Lessor at the location where vehicle was delivered to Customer, and a requirement that Customer, hereby assumes the insurer every process, pleading or paper of any kind relating to any [illegible] suit or proceeding, received by Customer or said driver in connection with any accident or occurrence involving vehicle. Said policy further requires that Customer and the driver shall refrain from making or offering the assistance of any claim and shall cooperate with Lessor and the insurer in the investigation and defense of any claim or suit. Said policy does not apply to [illegible] legislation for which Customer or the driver of vehicle or any insurance carrier may be held liable under any workmen's compensation or disability benefits law or under any similar law, (B) any obligation assumed by Customer or by such driver under any contract of whatever nature, (C) injury to or destruction of property owned by, rented to, in charge of or transported by Customer or the driver or (D) any liability of Customer or the driver of the employer of either with respect to loss from injury, sickness, disease or death of any employee of either while engaged in the business of operating or maintaining vehicle. It is understood that no person or organization is insured under said policy for hire in connection with the operation of vehicle, nor is any person insured under said policy while vehicle is used as a public or livery conveyance, or while vehicle is used to carry any property as a common carrier or in any business, unless specifically endorsed hereon. Subject to the foregoing, said policy insures Customer and, if Customer is an individual, members of Customer's household and relatives, and any partner or employee of Customer while using vehicle in the business of Customer, and any person responsible for or legally liable for the use of vehicle, provided the actual use thereof is with the permission of Customer, provided however that no such person or organization shall be insured under said policy if he, she or it has other valid and collectible insurance, whether primary, contributing or excess, covering such use; and provided further that with respect to any owned automobile not described herein, the insurance afforded by said policy shall apply only in excess of the amount or limits of any valid and collectible insurance available to the owner thereof for loss or damage to such owned automobile. Any provisions of said policy which are in conflict with the statutes of the state wherein vehicle is rented are hereby amended to conform to such statutes. Notwithstanding anything herein to the contrary, the insurance afforded by said policy is primary insurance to the extent required by law or regulation and is excess insurance over any other collectible insurance available to Lessor, its officers, agents or employees, whether primary, excess, contingent or on any other basis, to the extent permitted by law or regulation and to the extent so permitted, the liability coverage described in the policy is subject to the same terms, conditions, restrictions and limitations hereinbefore described under a board or self-insurance or similar program approved by the Insurance Commissioner of the state wherein vehicle is rented, and said policy is endorsed to conform thereto.

8. For provisions relating to collision damage waiver see Page 2.

9. The number of miles over which the vehicle shall have been operated pursuant to this Rental Agreement shall be determined by reading the standard mileage recording device attached to the vehicle by the manufacturer.

10. Without limitation of any general obligations or responsibilities imposed by other provisions of this Rental Agreement, Customer shall be solely liable and responsible for all fines, penalties and forfeitures imposed for parking or traffic violations while the vehicle is held, used, operated or driven pursuant to this Rental Agreement.

11. No right of Lessor under this Rental Agreement may be waived except by a written instrument duly signed by the President and Secretary of Lessor.

Page 1

A17